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impression generally accept the pervading principle that when damage is produced by an injury to a valuable right no mere technicality will be permitted to work a denial of justice.<sup>13</sup> It is on the question of the existence of the legal right, however, that the greatest difficulty is experienced.

In the case under consideration the chief tendency of the defendant's acts was to humiliate and disgrace the plaintiff. The natural recourse, therefore, was to sue for injury to reputation. But reputation is not an absolute right,<sup>14</sup> for it may be blackened with impunity by spoken words not actionable *per se* nor followed by special damage,<sup>15</sup> and it has been urged that even in those cases where redress is afforded, the gist of the action is not the injury to the reputation but the damage thereby produced.<sup>16</sup> By the prevailing view, however, there is a recognized right of reputation,<sup>17</sup> the violation of which will be conclusively presumed from the mere publication in permanent form of defamatory matter,<sup>18</sup> while if the publication be temporary the law will require proof of special damage before it concludes that the right has been invaded.<sup>19</sup> With the single exception that the continued and notorious surveillance took the place of spoken words, the principal case contains every element of slander, and identical results ensued. Therefore, while the injury cannot be technically classed as defamation, it differs therefrom only in form and not in substance, and it seems that the plaintiff's remedy was properly found in an action on the case in the nature of defamation.<sup>20</sup>

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CONDITIONS PRECEDENT AND THE STATUTE OF LIMITATIONS.—Suit brought in a court without jurisdiction should be ineffective to toll the Statute of Limitations, since in effect there has been no action at all.<sup>1</sup> The plight of a litigant who has brought such a suit, however, has induced some courts to extend liberally the benefit of the statutes prevailing in most jurisdictions<sup>2</sup> allowing an extra period within which to bring

<sup>13</sup>*Foot v. Card* (1889) 58 Conn. 1, 9; *Kujek v. Goldman* (1896) 150 N. Y. 176 and (1894) 9 Misc. 34.

<sup>14</sup>See authorities cited under note 9 *supra*.

<sup>15</sup>As in *Chamberlain v. Boyd* (1883) L. R. 11 Q. B. D. 407; *Hopwood v. Thorn* (1849) 8 C. B. 293.

<sup>16</sup>*Townshend, Slander & Libel*, (4th ed.) 57.

<sup>17</sup>See *Cooley, Torts*, (3rd ed.) 35; *Times Pub. Co. v. Carlisle* (1899) 94 Fed. 762.

<sup>18</sup>*Odgers, Libel & Slander*, (4th ed.) 7, 21.

<sup>19</sup>4 COLUMBIA LAW REVIEW 44; *Frazer, Libel & Slander*, (4th ed.) 3.

<sup>20</sup>See authorities cited under note 13 *supra*.

<sup>1</sup>*Fernekes & Bros. v. Case* (1888) 75 Ia. 152; *Sweet v. Electric Light Co.* (1896) 97 Tenn. 252; *cf. United States v. Amer. Lumber Co.* (1898) 85 Fed. 827. The Louisiana Civil Code, §§ 3518, 3551, provides, however, that the Statute is tolled "whether the suit has been brought before a court of competent jurisdiction or not." *Blume v. New Orleans* (1901) 104 La. 345.

<sup>2</sup>These statutes are all based on 21 Jac. 1 c. 16, 7 Stat. at Large 273-4. See § 405, New York Code of Civil Procedure: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of

suit when a judgment in an action has been rendered against the plaintiff other than on the merits, and without granting a new trial.<sup>3</sup> If the court entertained jurisdiction in the first instance and the error was only discovered upon appeal, the case comes exactly within the spirit of these statutes.<sup>4</sup> A litigant should not be penalized for an *ultra vires* error of the court and he is fairly entitled to the benefit of the statute. From this position the step is short to allowing a similar indulgence when the lack of jurisdiction is discovered by the court of first instance and the only cause of delay is the plaintiff's own error.<sup>5</sup> Jurisdictional questions are often very close and negligence cannot be imputed to a litigant merely because of an erroneous selection of the forum, though there might be cases where negligence would be so apparent as to bar relief.<sup>6</sup> A less liberal view, however, is taken by the recent case of *Gaines v. City of New York* (1912) 137 N. Y. Supp. 964, in which the court would not extend section 405<sup>7</sup> of the Code of Civil Procedure to assist a plaintiff whose action was dismissed by the City Court for want of jurisdiction in actions against the City of New York. The right to sue the municipality for negligence depended upon legislative permission and the legislature had stipulated in the city charter that actions should be commenced within one year. This and similar stipulations in other cases involving municipal liability have been uniformly regarded as conditions precedent to the right itself<sup>8</sup> and strict compliance is therefore demanded. This furnishes an additional ground for the court's decision.

A variation of the same question is presented when the time limit is established by the contract of the parties. Contracts providing shorter periods than the usual Statute of Limitations are common and are generally upheld,<sup>9</sup> as is seen in the recent case of *Maxwell Bros. v. Liverpool etc. Ins. Co.* (Ga. 1913) 76 S. E. 1036. They are usually regarded as creating a condition of the right at issue and are strictly enforced.<sup>10</sup> Section 414, subd. 1 of the New York Code of

the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

<sup>3</sup>*Woods v. Houghton* (Mass. 1854) 1 Gray 580; *L. R., M. R. & T. Ry. v. Manees* (1887) 49 Ark. 248; see *Matthews v. Phillips* (1708) 2 Salk. 424.

<sup>4</sup>*Ball v. Biggam* (1897) 6 Kan. App. 42; see *Harris v. Dennis* (Pa. 1814) 1 Serg. & R. 236.

<sup>5</sup>*Railway Co. v. Bemis* (1901) 64 Oh. St. 26.

<sup>6</sup>*Smith v. McNeal* (1883) 109 U. S. 426.

<sup>7</sup>See note 2 *supra*.

<sup>8</sup>*Reining v. Buffalo* (1886) 102 N. Y. 308; *Curry v. Buffalo* (1892) 135 N. Y. 366. In *McKnight v. New York* (1906) 186 N. Y. 35, the court applied the exception of § 396 in such an action; but see *Winter v. Niagara Falls* (N. Y. 1907) 119 App. Div. 586; *Norton v. The Mayor etc.* (N. Y. 1896) 16 Misc. 303.

<sup>9</sup>*Wood, Limitations*, (3rd ed.) § 42; *contra*, *Miller v. Ins. Co.* (1898) 54 Neb. 121.

<sup>10</sup>*Riddlesbarger v. Hartford Ins. Co.* (1858) 7 Wall. 386; *McElroy v. Ins. Co.* (1892) 48 Kan. 200; *Matthews v. Amer. Centr. Ins. Co.* (N. Y. 1896) 9 App. Div. 339; *Gough v. McFall* (N. Y. 1898) 31 App. Div. 578; *cf. Semmes v. Ins. Co.* (1871) 13 Wall. 158; *Peoria etc. Ins. Co. v. Hall* (1864) 12 Mich. 202.

Civil Procedure bears directly on this question, but its interpretation has caused considerable difficulty to the courts. This section makes the provisions of the general chapter on limitations of actions "the only rules of limitation applicable, to a civil action...except in one of the following cases: (1) A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties." The courts maintain that this section merely allows the legislature to prescribe a different time period, or the parties to contract for a shorter time limit;<sup>11</sup> and that all the exceptions to the general statute of limitations apply to limitations imposed by contract,<sup>12</sup> other sections of the Code,<sup>13</sup> and special statutes.<sup>14</sup> This reasoning seems first to have been used to introduce the general exceptions as qualifications of other sections of the Code,<sup>15</sup> and later as a modification of contracts<sup>16</sup> and special statutory rights.<sup>17</sup> In reading these exceptions into the other Code sections much injustice was undoubtedly prevented and the intention of the legislature carried into effect; but more doubtful ground is reached when this same feeling led the courts to impose a similar restriction on the right of parties to contract, as the assumption that the parties contracted with the idea of having the exceptions incorporated in the contract<sup>18</sup> is probably disproved in most cases by the facts. It would seem, therefore, that section 414 of the Code might better be construed as exempting a contractual limitation from the exceptions as well as from the time limit prescribed by the general chapter on limitations, and that such a limitation should be regarded as a condition precedent to the right of action, requiring strict compliance with its terms.

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<sup>11</sup>*Titus v. Poole* (1895) 145 N. Y. 414.

<sup>12</sup>*Hamilton v. Ins. Co.* (1885) 156 N. Y. 327. It may well be argued that the *Hamilton* Case does not go to the length of adding to the contract of the parties. The Court at page 336 rests on the supposition that the standard fire policy is a contract imposed by the legislature and from this reasoning it may be said that the court is merely modifying a statute. While the statute requiring a standard fire policy does not create a contract any more than laws regulating marriage impose a marriage on the parties, this language of the court may be used later as a basis for distinction.

<sup>13</sup>So it has been held that § 401 of the New York Code of Civil Procedure qualifies § 1758; *Ackerman v. Ackerman* (1910) 200 N. Y. 72; § 1822, *Hayden v. Pierce* (1895) 144 N. Y. 512; but not § 1596, *Wetyen v. Fick* (1904) 178 N. Y. 223; and that § 405 qualifies § 1822, *Titus v. Poole supra*; cf. *Gough v. McFall supra*. The case of *Wetyen v. Fick* cannot be reconciled with the other cases, and the remarks of the court as to public policy (see page 229) are equally applicable to other actions involving the title to real estate and yet have not been considered controlling.

<sup>14</sup>*Conolly v. Hyams* (1903) 176 N. Y. 403; *Seaton v. Hixon* (1886) 35 Kan. 663; cf. *McElroy v. Ins. Co. supra*; *contra*, *Hammond v. Shephard* (N. Y. 1888) 50 Hun 318. If a statute gives a right unknown to the common law, it may well be held that limitations in it qualify the right and not the remedy, and hence that the general rules of limitations and their exceptions are inapplicable. See *Colell v. D. L. & W. R. R. Co.* (N. Y. 1903) 80 App. Div. 342; *Cavanagh v. Ocean Steam Nav. Co.* (1890) 13 N. Y. Supp. 540.

<sup>15</sup>*Hayden v. Pierce supra*.

<sup>16</sup>*Hamilton v. Ins. Co. supra*.

<sup>17</sup>*Conolly v. Hyams supra*.

<sup>18</sup>See *Bellinger v. Ins. Co.* (N. Y. 1906) 51 Misc. 463.